Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	GC Docket No. 92-52
	)	
Reexamination of the Policy	)	RM-7739
Statement on Comparative	)	RM-7740
Broadcast Hearings	)	RM-7741

COMMENTS OF J. MCCARTHY MILLER

J. McCarthy Miller, by his attorneys, hereby submits these Comments in the above-captioned rulemaking proceeding. Mr. Miller is a participant in perhaps the single oldest FCC comparative hearing case currently pending; that experience uniquely qualifies him both to comment on the deficiencies of the old comparative regime and to recommend corrective measures for the future.

Introduction

Mr. Miller is an applicant for a new Class A FM station in Gulf Breeze, Florida, a small town just outside Pensacola. The lead application in the case was filed in March of 1984. The proceedings at the processing line, administrative law judge, and Review Board levels have now consumed more than ten years. The full Commission (where applications for review are presently pending) has yet to issue a single order in the case. The original 16 applicants have now been reduced, by a process of attrition, to

three. During the decade in which this case has been pending, Mr Miller's wife (originally a partner in the application) has passed away. A couple who formed another applicant got divorced when the wife became mentally incompetent and was institutionalized. A third applicant, composed of a limited partnership between two couples, had to be restructured when the partnership broke up. In a very real sense, the natural persons involved in the case have been put at a disadvantage because only a corporation with perpetual existence is likely to survive the painstakingly slow deliberative process which has occurred here.

I. Overriding Guidelines.

There is simply no supportable justification for an administrative process which takes ten years (and still counting) to award a license for a fairly small FM station. The sheer human toll has been enormous, not to mention the continuing lack of service to the people of Gulf Breeze. (This is the first radio station licensed to that community.) Moreover, as hearing after hearing has been held, the costs have also mounted to the point where the combined expenses of the remaining parties exceed the value of the permit at issue. This makes it virtually impossible to settle the case. All of this suggests three critical elements of any plan which the Commission devises to replace the current comparative process:

1) It is probably true that the public has suffered in the Gulf Breeze case far more from the sheer delay in Commission action than by any minuscule benefit it might have gained from one applicant or another having a few more or few less media interests or integrating a few more or less percent of its ownership. In striving to find the best applicant through a meticulous and time-consuming evaluation of fine comparative criteria, the Commission has unfortunately turned the best into the enemy of the good. Expeditious resolution of mutually exclusive applications should be paramount.

2) As a means of achieving this paramount goal the comparative criteria should be simple and easily justiciable. The more the criteria involve shades of grey or mere promises of future conduct or representations which can only be tested through extensive hearings and cross-examination, the greater the delay which will necessarily be entailed.

3) All issues should be tried at once. The pattern of permitting late-filed motions to enlarge which then result in repeated remands for new hearings added at least four or five years to the schedule of the Gulf Breeze case. While the Commission has attempted to clamp down on post-hearing motions to enlarge, the number of cases which have been remanded by the Review Board and the Commission has actually expanded in recent years. Remands should only be permitted in truly extraordinary circumstances.

4) It would be a gross injustice to applicants who have already run the expensive and lengthy gauntlet of a comparative hearing to have to start an entirely new hearing and appeals process under whatever new criteria the Commission adopts. Nor could it conceivably be in the public interest to commence a new ten year cycle of hearings before licensees can actually begin construction in their markets. Should the Commission insist upon new hearings for long pending applications, it would surely be faced with a flood of motions for writs of mandamus from the Court, all chanting that justice delayed is justice denied. Suffice it to say that some means other than new comparative hearings must be fashioned to deal with the applications which have long languished in the Commission's pipeline.

II. Can New Comparative Criteria Be Fashioned Which Will Pass Court Scrutiny?

One of the primary difficulties which the Bechtel Court had with the old comparative criteria was the fact that they were impermanent and were not enforced or policed even during the winning applicant's ownership of the station. Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993) at Section III.A.1. The simple solution to that problem is to require that comparative attributes be maintained for at least three years by the winning applicant or any successor-in-interest to that applicant.[1]/ Thus, for example, a

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[1]/ The three year period represents a return to the holding period abandoned by the Commission several years ago.

locally owned applicant could sell its station but only to another local owner during that three year period. Any deviation during the holding period from the criteria under which the applicant won the license would require prior approval, via a waiver, for good cause. This rule, while strict, would force applicants to approach comparative cases realistically and with the belief that their proposals are for the relatively long term. Shorn of the now discredited integration criteria and bolstered by a strict enforcement policy, a revamped comparative scheme should not only better serve the public interest but meet any Court challenge.

III. New Criteria and Their Application to Pending Applications.

But what criteria should apply to applicants which have already undergone hearings? While some might claim that it is unfair to apply new criteria to applications which were structured on the basis of the old criteria, the reality is that the applicants are who they are. There is certainly no unfairness in evaluating the applicants, as they now exist, against whatever criteria are adopted. To permit fundamental amendments by the applicants now would simply be encouraging a new round of gamesmanship -- structuring applicants not to reflect long-term economic or business realities but rather to garner comparative credits. That is exactly the sort of gamesmanship which the new comparative process should be moving away from. Again, not permitting current applicants to amend to conform to the new

criteria would also streamline the ultimate resolution of these cases by eliminating a time-consuming and contention-filled step.

The ideal solution would be to resolve the pending cases on the basis of the record already established, eliminating those elements which the Court has rejected. Those elements of the old "integration" criteria which still have merit could be retained. The Anax doctrine should be discarded in this context since the struggle to conform non-voting ownership realities to the comparative process has resulted in absurd hair-splitting and extremely arbitrary resolutions of what is or is not a bona fide structure. All applicants should be judged on the basis of their ownership, whatever form that ownership takes. Under this scenario, applicants would be evaluated on:

1. Past or Present Broadcast Experience. Broadcast experience of the station's owners would also be a plus, since in most businesses, experience in the field is useful in successfully starting a new business. Past ownership would not be necessary with this criterion, thus encouraging new entrants.

2) Past Broadcast Ownership. Past broadcast ownership by the station's owners would also constitute useful and helpful experience in itself. The availability of this credit might also help to mitigate the disadvantage that multi-station owners might otherwise face because of the diversification demerit.

3) Local Residence. Owners who live within 15 miles of the community of license can be expected to know the needs of the service area and ensure that those needs are addressed. This would be a go/no go criterion based on the owners' residence within, or within a fixed mileage of, the community of license.

4) FCC Compliance.[2]/ A record of compliance with the Communications Act and the FCC's rules and policies would normally be an important factor which the Commission would want to take into consideration in this context as it does in the license renewal context. See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing, 7 FCC Rcd. 6564 (1992). Thus, a demerit point would be assessed for any FCC forfeitures, short-term renewals, or other adjudicated FCC derelictions which the applicant or its owners have experienced.

5) An AM preference. The Commission has recognized that AM station owners, particularly daytimers, have faced enormous obstacles in surviving economically. This reality has resulted in many LMAs between AM stations and FM stations. The past contributions of AM station owners should be reorganized by awarding them a preference in any contest for a new FM station in their community, provided they agree to keep the AM station on the air or sell it to another operator.

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[2]/ Since this is a new criterion, it would require a supplement.

Since we have postulated here the jettisoning of the Anax doctrine, it is possible that some minor supplementing of the record would be necessary to supply information about limited partners or non-voting shareholders which was irrelevant under the prior comparative regime. However, since such information was customarily elicited in the course of discovery (as part of the testimony of the bona fides of two-tiered applicants) it is not expected that any dramatic or new revelations would be added now. Any such supplement would be submitted under penalty of perjury. With these indicia of reliability, no hearing would be necessary to test the truth of the matters asserted, absent an extraordinary showing by a competing applicant that material supplied in a supplement was untrue.

This plan salvages the most worthwhile features of the old criteria in a way which eliminate the concerns raised by the Court with respect to integration. The criteria proposed concentrate on readily ascertainable biographical facts about the applicants rather than on pie-in-the-sky promises which are impossible to test in advance. The criteria employed would be lasting commitments which applicants would not undertake lightly. Finally, the plan would permit prompt resolution of all outstanding cases in the pipeline.

One further proposal toward that end is to circumvent the

Commission's normal two-step review process. All cases which have already had hearings would be resolved by the ALJs (if no I.D. has been issued), or by the Review Board (where exceptions have been filed) under the new simplified criteria. Factual supplements would be filed with the ALJs or Review Board, as appropriate. No new rounds of pleadings would be solicited or entertained. The ALJ or Review Board would then prepare a brief recommended decision which the Commission would adopt (or modify, if necessary). The Commission itself would act on all cases which have been remanded by Court or which are pending review at the full Commission level. All pending cases would therefore be resolved in a matter of four to six months.

An alternative would be to permit all pending applicants a 30 day period in which to report a full settlement agreement, with another 30 days to finalize the documentation. In the absence of such a report, a straight lottery would be held immediately. This alternative has the virtues of encouraging speedy settlement, promptly resolving the cases, and not applying new criteria to old applicants.

It will have been observed that minority preferences have been deleted from the preference categories noted above. While it is true that the minority preference barely passed Supreme Court muster, Mr. Miller believes that the Commission should get out of the business of social engineering. The Commission's mandate is

not to perfect society or to achieve racial balance, but rather to regulate the airwaves in the public interest. There should be no preferences for any applicant -- black or white -- based on race, creed or color. Any policy designed to remedy societal ills necessarily creates suspect favoritism towards one group or another. The solution is not to deliberately "tilt" the scales in favor of one group (no matter how well-meaning the effort), but rather to strictly ensure that all of the Commission's policies are truly racially and otherwise unbiased.

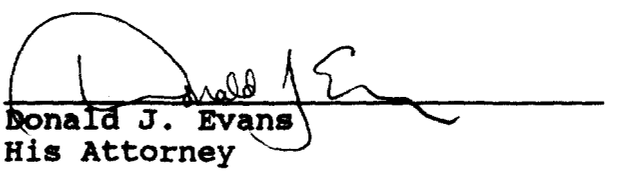
Moreover, if the Commission were to adopt a minority preference as it has existed in the past, the Commission would be required, under Metro Broadcasting, 497 U.S. 547 (1990), to establish solid factual underpinnings for the redress of past racial disadvantages. These underpinnings would have to be continually reviewed and updated to ensure that the high threshold necessary to justify a racial preference remains extant. Certainly the Bechtel decision teaches, if nothing else, that the Commission must periodically assess the validity of its comparative criteria. This means the Commission will have to constantly monitor the racial makeup of its broadcast licensees -- a truly intrusive and heavy-handed governmental involvement in licensee affairs. While racial harmony and equality are certainly worthy goals, the comparative licensing of broadcast facilities is hardly an effective way to achieve it.

Conclusion

Mr. Miller respectfully submits that the proposals set forth above will have the result of fairly and promptly resolving comparative cases which have long revolved around the Commission's adjudicatory carousel. As a participant in the single slowest comparative case ever to remain pending without so much as a full Commission decision, Mr. Miller believes he is entitled to demand, on behalf of himself and the people of Gulf Breeze, that this an other cases be swiftly and finally terminated.

Respectfully Submitted,

J. MCCARTHY MILLER

By: 

Donald J. Evans
His Attorney

McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(202) 293-0700

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